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IN THE

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus, the American Farm Bureau Federation, will address the following questions:

1. Whether the court of appeals' narrow construction of the "normal farming" exemption set out in Section 404(f) of the Clean Water Act, and its expansive construction of that section's "recapture" provision, fail to comport with the statute or its implementing regulations.

2. Whether the court of appeals' misconstruction of Section 404(f) imposes intolerable burdens on farmers and ranchers that Congress did not intend.

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

With the written consent of the parties given and filed with the Clerk of the Court, the American Farm Bureau Federation respectfully submits this brief as *amicus curiae*.[1]

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[1] Counsel for *amicus curiae* have authored this brief in whole and no other person or entity other than *amicus*, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICUS CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5 million member families. AFBF has participated in many cases involving issues of importance to its members in the U.S. Supreme Court, including issues arising under the Clean Water Act (CWA).

AFBF's farmer and rancher members produce virtually every agricultural commodity produced commercially in the United States. They own or lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. In recent years they have become increasingly subjected to restrictive laws and regulations that impair their ability to farm efficiently, and, in some in instances, have eliminated their ability to farm altogether. The protection of wetlands under Section 404 of the CWA poses one of the more onerous regulatory problems production agriculture faces today.

Section 404 of the CWA, 33 U.S.C. § 1344, regulates "the discharge of dredged or fill material into the navigable waters at specified disposal sites." From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a very controversial, complex and contentious program. Its application and misapplication to farms and farming have played a key role in its evolution.

AFBF has a direct interest in the outcome of the instant case. AFBF's farmer and rancher members have been severely restricted in the productive use of their lands by the Ninth Circuit's crabbed interpretation of Section 404(f) of the

Clean Water Act (CWA)—an interpretation that eviscerates the Congressional exemption of normal farming practices from the burdens of the CWA's Section 404 permit program. The Ninth Circuit's construction of the statute's exemption and recapture provisions expands the reach of the CWA far beyond what Congress intended, at best creating uncertainties about permissible conduct and at worst exposing farmers and ranchers pursuing routine farming activities to substantial penalties.

AFBF has followed the wetland evolution for nearly three decades and watched it take on a life of its own as it marched relentless up the hill consuming ever-dryer land. Those forces which did not succeed in getting federal land use control legislation in the late 1960s and early 1970s seem to have seized upon the Section 404 wetlands program as a mechanism to control as much of the landscape as possible. The federal agencies, especially the Environmental Protection Agency, Corps of Engineers and the Fish and Wildlife Service, with the aid of the lower courts, have been happy to cooperate in expanding the reach of the Section 404 wetlands program. Now the Ninth Circuit has planted the seeds for further expansion.

AFBF's concerns with the Ninth Circuit's decision can be summarized as follows:

1. The decision clearly narrows the normal farming exemption of Section 404(f)(1) and places the U.S. Army Corps of Engineers and the Environmental Protection Agency in the business of regulating day-to-day farming and ranching practices.
2. The decision disturbingly finds that normal agricultural plowing can result in the discharge of a pollutant.
3. The decision finds that a farmer or rancher's plow can be a point source.

4. The decision expands the Section 404(f)(2) "recapture" provision to the point where a farmer or rancher will not be able to change his cropping patterns or commodity mix without a permit from the federal government or significant concern of a penalty for violating the Clean Water Act.

This Court should grant review because the Ninth Circuit's decision erroneously interprets several key elements of Section 404 resulting in expansive, intrusive and overreaching federal regulatory authority over normal farming and ranching activities which Congress never intended to regulate at all under the CWA. As Judge Gould aptly noted in his dissenting opinion, the majority's decision ignores Congressional intent, eviscerates the CWA's jurisdictional requirements and farmer exemptions, and substantially alters the federal-state framework by permitting federal encroachment upon traditional state authority to regulate land use and agricultural activities.

ARGUMENT

I. THE NINTH CIRCUIT'S CONSTRUCTION OF SECTION 404(f) DOES NOT COMPORT WITH THE TEXT OF THE STATUTE OR ITS IMPLEMENTING REGULATIONS

This case squarely presents an important issue of federal law with significant practical consequences for farmers and ranchers. In 1977, Congress made a deliberate policy choice to exempt the ordinary agricultural activities of farmers and ranchers from the costly and burdensome requirements of the Clean Water Act (CWA) Section 404 permit scheme. Now, the Ninth Circuit in this case has seriously narrowed the scope of the exemption for "normal farming . . . activities" while simultaneously expanding the reach of the statute's so-called "recapture" provision. In so doing, it has extended the scope of the permit requirement far beyond that intended by Congress.

This overreaching has significant adverse consequences for all American farmers and ranchers. It interrupts long established and accepted agricultural practices and adds a new layer of burdensome regulatory compliance requirements and costs. It denies farmers and ranchers full entitlement of property ownership and the ability to farm and ranch in an efficient, flexible, productive and profitable manner. It spawns precisely the regulatory nightmares from which Congress intended to protect farmers and ranchers when it amended the CWA in 1977. This Court should intervene in this case to reinstate the intended breadth of the normal farming exemption.

A. Congress Specifically Amended The Clean Water Act To Exempt Ordinary Farming Activities From The Burdensome Section 404 Permit Scheme

Controlling surface and subsurface water to ensure sufficient, but not overly abundant supply is critical to successful farming and ranching. Thus, it is not surprising that the wetlands protection program enacted in Section 404 of the Clean Water Act of 1972 engendered considerable controversy between the government and the agricultural community when a federal district court ruled that the jurisdiction of the Act extended to waters far beyond "the traditional tests of navigability" and could reach ordinary farmland. See *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

The expansive reach of the Act threatened to impose a permit requirement on enormous numbers of farmers and ranchers whose lands occasionally contained standing water. Section 404 became "a symbol to many Americans of how a well-intentioned legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for ranchers, farmers, foresters, and average citizens of this

country." 4 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act ("Legislative History")* 902 (1978) (statement of Sen. Bentsen). As the chairman of the Senate Committee on Environment and Public Works observed, the complaints of farmers and ranchers evinced "widespread concern that many activities that are normally considered routine would be made extremely difficult because of the complex regulatory procedures." *Id.* At 897 (statement of Sen. Randolph).

These concerns lead in 1977 to amendments to the Act that provided "for the first time statutory recognition that normal farming, ranching, and silviculture activities do not belong in this permit program." 3 *Legislative History* at 351 (statement of Rep. Hammerschmidt). Congress provided that no permit is required for "the normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices," or "for purposes of construction or maintenance of . . . irrigation ditches, or the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A), (C). On the other hand, a so-called "recapture" provision stipulated that a permit was required for discharges of dredged or fill material "incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previous subject." *Id.* § 1344(f)(2).

These amendments, as the Seventh Circuit has observed, created "a delicate balance of exceptions that protected wetlands while permitting routine activities to go on unimpeded." *United States v. Huebner*, 752 F.2d 1235, 1241 (7th Cir.), cert. Denied, 474 U.S. 817 (1985). Congress thus made a deliberate policy choice that "[t]he upland farming, forestry and normal development activity carried out primarily by individuals and as a part of a family business or family farming activity need not bear the burden of an effort directed

primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters." Senate Report No. 370, quoted in 4 *Legislative History* at 644. As Senator Muskie, one of the principal Senate sponsors, explained, "[t]he drainages exemption is very clearly intended to put at rest, *once and for all*, the fears that permits are required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainages." *Id.* At 1042 (emphasis added).

B. Congress Did Not Intend That The Application Of The Normal Farming Exemption Involve The Manufacture Of Artificial Distinctions In Agricultural Land Usage

The Ninth Circuit, rubber stamping the interpretation of overzealous regulators, construed the statutory exemption and implementing regulations very narrowly. It ruled that changing irrigated pasture and forage croplands containing wetlands to vineyards and orchard was akin to the conversion of wetland areas to agricultural uses where none had previously existed.

An examination of the examples of normal farming and ranching activities enumerated in Section 404(f) lends support to the view that Congress did not intend the courts applying the exemption to manufacture artificial distinctions in land usage for various agricultural purposes (such as between pastures and vineyards and orchards). The listed activities include *land preparation* (plowing, seeding), *production* (cultivating, harvesting), and *maintenance* (drainage and conservation). Contrary to the Ninth Circuit's holding, there is absolutely no indication that Congress regarded the precise nature of a farmer or rancher's actions within this wide range of conduct as determinative of the exemptions applicability.

Congress understood the frequency with which farmers and ranchers can, and often must, change and/or diversify their operations to achieve an economically viable or more profitable farming or ranching operation. The transition from one farming or ranching use to another, such as from pasture to planting crops, occurs often in production agriculture. Preparatory activities, which may include draining and plowing and often occur over a period of years, still constitute normal farming and ranching activities.

Pasturing and planting are simply subsets of the myriad activities that comprise "normal farming." Acknowledging this reality, the statute and regulations give farmers and ranchers flexibility to operate within the broad categories of activities (farming, silviculture, and ranching) to which the Section 404 exemption applies, without worrying that the choice between one sort of farming or ranching activity and another on a given piece of land may result in a CWA violation. The Ninth Circuit's ruling that it is the *particular* existing use of a portion of a farm or ranch that counts in determining if the normal farming exemption applies, not the fact that the land is part of a *continuing farming or ranching operation*, destroys this very necessary flexibility and for practical purposes destroys the exemption.

The Ninth Circuit also wrongly construed the recapture provision of Section 404(f) to extend the reach of the CWA into normal farming activities that Congress intended to leave alone. That provision requires permitting for an activity that "bring[s] an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). The statute provides no further elaboration on the meaning of "use," and the conflicting provisions of the implementing regulations simply confuse matters.

On the one hand, the regulations appear to adopt a broad and flexible approach to farming and ranching "uses" and

"activities" by specifying that a "permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from a silviculture to agricultural use." 33 C.F.R. § 3323.4(C). This provision implies that a conversion from one agricultural use to another—for example, from irrigated forage crop production and pasturing to vineyards and orchards—would avoid the recapture provision. On the other hand, the regulation states categorically that "[a] conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." *Id.* This latter provision lacks textual or structural support in the CWA, is inconsistent with related regulatory provisions, and, more importantly, conflicts with the intent of Congress. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) ("The question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations"). Every indication in the statute and regulations, save this one, points to "farming, silviculture, or ranching"—not to "wetlands or non-wetlands"—as the relevant frames of reference for the application of the recapture provision.

Moreover, the legislative history of the normal farming exemption makes clear that Congress did not mean to interfere with the operations of farms and ranches by requiring a permit every time a farmer or rancher makes a change in the productive use of agricultural lands from one crop to another, or from pasture to planting. Congress, as Senator Muskie pointed out, well understood that "draining poorly drained farm[land]" would affect a substantial hydrological alteration to "millions of acres" nationwide. 4 *Legislative History* at 1042. Yet, as the Senator stated, the 1977 amendments established "once and for all" that no permits are required for such activities. *Id.* Accordingly, the Ninth Circuit's contrary ruling notwithstanding, the recapture provision of Section 404(f)(2) does not remove active and

ongoing farming and ranching operations from within the ambit of the normal farming exemption merely because there occurs a change from one agricultural use to another.

C. Plowing Is Not Now And Never Was A Discharge Subject To Section 404 Regulation

On March 27, 1975, the U.S. District Court for the District of Columbia ruled that "navigable waters" extend to "the maximum extent permissible under the Commerce Clause of the Constitution" and are "not limited to the traditional tests of navigability." *Natural Resources Defense Council, Inc. v. Callaway,* 392 F. Supp. 685 (D.D.C. 1975). Many within the U.S. Army Corps of Engineers (Corps) felt this dramatic expansion of federal jurisdiction should at least be confirmed by a higher court, but the U.S. Department of Justice decided against an appeal. Stine, *Regulating Welands in the 1970s, U.S. Corps of Engineers and the Environmental Organizations*, Journal of Forest History, April 1983.

The Corps realized that any challenge to or relief from the court ordered expansion of regulatory jurisdiction would have to take place in the political arena. On May 6, 1975, the Corps released a provocative news release that stated among other things:

> Federal permits may be required by the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion.

The release warned that "millions of people may be presently violating the law" and "may be subject to fines up to $25,000 a day and one year imprisonment." *Id.*

The anticipated firestorm was quick to follow as the story was picked up by newspapers across the country. Environmental groups viewed the news release as a deliberate attempt

by the Corps to sabotage the court order. And the Administrator of the U.S. Environmental Protection Agency, Russell Train, wrote the Chief of the Corps on May 16, 1975 saying:

> We are particularly concerned that the false impression that farmers must obtain permits whenever they plow a field be corrected. Since this was clearly not contemplated by either the Corps or EPA and is not required by the statute, we fail to understand how such a statement could appear in this press release. As you are well aware, the primary concern of section 404 is to address situations where dredged or fill material is discharged into wetland areas. By no stretch of the imagination can the simple act of plowing be considered to fall under that category.

Id. No one can dispute that the environmental community and the federal government's key official for administering the CWA, the Administrator of the EPA, made it clear in 1975 that plowing was not a discharge subject to Section 404 regulation.

Responding to the furor raised by the May 6, 1975 news release, the Corps included in the definitions of "dredged material" and "fill material" an *exclusion* for "[m]aterial resulting from normal farming, silvacutire [sic], and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fibre, and forest products. 33 C.F.R. § 209(d)(4) and (6) (July 25, 1975). As the Corps made clear in the preamble to those regulations, material resulting from these practices was neither fill nor dredged material, thus excluded from regulation under Section 404. This exclusion, along with some other exclusions written into the Corps' 1975 regulations, and concurred in by the EPA, became the catalyst for the statutory exemptions enacted by Congress as Section 404(f) of the 1977 amendments to the CWA. But it is important to note that Congress *exempted* what the Corps had already *excluded*. In other words, Congress said any discharges of dredged or fill material

resulting from these practices were exempt from regulation whereas the agencies had already said these practices were not a discharge of dredged or fill material in the first place.

It is important to distinguish between an "exclusion" and an "exemption". An excluded activity is one determined not to involve a discharge in the first place and is thus not subject to any program regulating discharges. An exempted activity is one that does involve a discharge, but that discharge has been statutorily exempted from regulation subject to a so-called recapture provision.

There is nothing in the statute or the legislative history to suggest that Congress intended to no longer treat these practices as exclusions. In fact the legislative history includes a number of references indicating an intent to endorse the exclusions. In House debate on December 15, 1977, Congressman Hammerschmidt stated:

> On the positive side, we will now have for the first time statutory recognition that normal farming, ranching and silviculture activities do not belong in this permit program. *These exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material.* (Emphasis added)

Report on Resolution Providing for Consideration of Conference Report on H.R. 3199, Clean Water Act of 1977, 351.

On the Senate side, Senator Baker stated:

> Second, conferees adopted the Senate amendment to section 404 that clarifies the *exclusion* of activities that do not involve point source discharges, such as *plowing* and upland conservation activities, *and exempts others* that may involve discharges or other placements of dredged or fill material that will be sucessfully controlled by management practices and performance standards imposed through the section 208 program.

* * *

The conferees agreed to adopt the approach taken by the Senate in the Senate-passed bill with respect to activities performed by the farming, forestry and mining industries. First the conference bill clarifies *the exclusion of activities that do not involve point source discharges of dredged or fill material, such as plowing*, seeding, cultivating, harvesting, and upland conservation and minor drainage practices. The conference bill also responds to testimony received in both the House and Senate committee hearings on the section 404 question by *specifically exempting other farming, forestry, and mining practices that do involve minor discharges of dredged or fill material* such as stock and farm ponds, logging roads, temporary mining roads, and farm roads. It is expected that these activities, while exempt from permit requirements, would still be subject to section 208 including the best management practices approved by EPA and imposed through a statewide regulatory program. (Emphasis added)

Id. at 524.

By not dealing with the issue of exclusion versus exemption in the statute itself, Congress confused the issue as to whether plowing is an exclusion, an exemption or both. Nevertheless, the argument can be made that some forms of plowing, not meeting the definition prescribed for excluded plowing, would still result in plowing that is exempted. A joint field memorandum issued by the Corps and the EPA in 1990 lends support to this argument by stating: "For example, plowing that is exempt under Section 404(f) means all mechanical means of manipulating soil, *including land leveling*, to prepare it for planting of crops." EPA and Department of the Army, Memorandum for the Field, May 3, 1990 (emphasis added). Land leveling is not included in the definition of plowing used for the exclusionary statement in Corps regulations.

The distinction between an "exclusion" and an "exemption" would not be important were it not for the fact that the exemptions enacted in 1977 in Section 404(f)(1) were subject to recall if they triggered the restrictions of Section 404(f)(2), the so-called "recapture" provision. Under Section 404(f)(2), an otherwise exempt discharge is "recaptured" if there is a change in use of waters and a flow/circulation impairment or reach reduction. Because of the federal government's increasing desires to control activities that harm wetlands, the Corps and the EPA have narrowed the scope of the exemptions through the years by use of this recapture provision. But they have not changed their 1975 decision that normal plowing is *excluded*.

After Attorney General Benjamin Civiletti opined September 5, 1979 that the EPA and not the Corps had the ultimate authority to construe the meaning of the Section 404(f) exemptions, EPA adopted in 1980 regulations defining "plowing" and concluded with a sentence supporting the 1975 decision that plowing was not a discharge in the first place. The Corps adopted the same language in 1982. Both agencies have since overhauled their regulations that include the definition of plowing, but have not changed the 1980 definition. Of greater significance, both agencies continue to carry a clear statement at the end of the definition that plowing conforming to the definition is "never" a discharge:

> Plowing means all forms of primary tillage, including moldboard, or wide-blade plowing, discing, harrowing, and similar physical means used on farms, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities

> which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. *Plowing, as described above, will never involve a discharge of dredged or fill material.* (Emphasis added).

EPA regulations 40 C.F.R. 232.3(d)(4) and Corps regulations 33 C.F.R. 323.4(a)(1)(iii)(D).

In addition, and lending further support to the conclusion that plowing, like that which took place in the instant case, is excluded from Section 404 regulation, the EPA stated in the preamble to it regulations: "Several commentators questioned the requirement that plowing take place on established farm or forest lands. This requirement has been deleted."

D. "Deep Ripping" Is Normal Plowing

"Deep ripping" is but one of numerous types of normal plowing that farmers and ranchers routinely employ in the conduct of their production agricultural activities. The basic purpose of "deep ripping" is to provide hardpan penetration (a basic purpose and result of all types of plowing) *and* at the same time form root beds that allow ample plant root development as well as water infiltration and retention. See *Agricultural Resource Management Study (ARMS), Phase II—Production Practices, Interviewer's Manual*, U.S. Department of Agriculture, National Agricultural Statistics Service, August 2000.

The term "deep ripping" can refer to plowing that involves depths ranging from a few inches for such crops as lettuce, soy beans, wheat, cotton, and pumpkins, to several feet for grape vines and fruit trees. *See i.e.*, Rester, *Subsoiling to Increase Cotton Yields,* Louisiana State University, Ag Center Research & Extension (deep ripping 12 to 15 inches to fracture hardpans); *2001 Virginia Cotton Production Guide*, Virginia Cooperative Extension Service, Virginia Tech

(ripping and bedding 6 to 9 inches); *For More Soybeans, Dig Deep*, Agriculture Research, February 1999 (deep tillage to a depth of 12 to 16 inches); *The Mid-Atlantic Wine Grape Grower's Guide*, North Carolina State University (subsoiling 18 to 24 inches); *Irrigating Deciduous Fruit and Nut Trees in Oregon*, Oregon State University Extension Service, May 1996 (deep ripping to 4 feet). It is also a recommended practice by both state agricultural extension services and environmental quality agencies for not only improved crop yields, but also for disease control and water conservation and quality control. *See i.e., Minimum tillage practices affect disease and yield of lettuce*, California Agriculture, January-February 2002 (deep ripping 15 to 20 inches); *Small Ranch*, University of Nevada at Reno (controlling soil erosion due to compacted soil runoff by deep ripping and planting or mulching); *Irrigation Management Practices To Protect Ground Water And Surface Water Quality, State of Washington*, EM4885, Washington State Department of Ecology and Cooperative Extension, Washington State University (rip hardpans and compacted soils to improve filtration rates).

The fact that "deep ripping" may not be performed annually or on a frequent basis does not make it any less a "normal" plowing activity for production agricultural purposes. The frequency with which it is performed depends upon matters of soil compaction and crops. It may be performed only once in connection with the establishment of a vineyard or orchard, once every several years where no-till practices are used, or it may be performed annually in the growing of row crops or grains. Frequency is not the determining factor in what constitutes "normal" in production agriculture; crops, conditions, technology and results are.

Depth and frequency of occurrence have nothing to do with normal plowing for purposes of the Section 404(f) agricultural exemption. As previously indicated, the purposes of "deep ripping" are twofold: hardpan penetration *and* root bed preparation. Hardpan penetration usually takes place

within a matter of a few inches. Otherwise the depth to which "deep ripping" is to be performed depends upon the root bed needed for the particular type of crop to be planted, and this depth may range from a few inches to several feet. In sum, "deep ripping" is "normal" plowing and a normal farming or ranching activity that is excluded or exempted from Section 404 regulation.

II. THE NINTH CIRCUIT'S MISCONSTRUCTION OF SECTION 404(f) IMPOSES INTOLERABLE BURDENS ON FARMERS AND RANCHERS

The Ninth Circuit's construction of Section 404(f) to require farmers and ranchers to obtain a permit to convert wetland forage crop and pasture lands into vineyards and orchards imposes significant financial and administrative burdens; loss of time completing and processing bureaucratic paperwork, legal fees, delay and uncertainty, potential fines, and loss of productive land—all costs that will either make farming and ranching less profitable and thus less desirable as an investment and livelihood, or will drive up the prices charged to consumers for food and other basic necessities. The administrative nightmare associated with the Clean Water Act Section 404 permit scheme often deters farmers and ranchers from even applying for a permit and discourages all but the most determined from challenging a permit denial in the courts.

Congress envisioned no such consequences when it amended the CWA in 1977. The legislative history is replete with statements showing Congress intended that the exemption scheme would give farmers and ranchers real protection. By 1977, Section 404 "ha[d] become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism." 4 *Legislative History* at 903 (statement of Sen. Bentsen). Congress undertook to amend the CWA to reflect "the fact that we never intended under Section 404 that the Corps of

Engineers be involved in the daily lives of our farmers, realtors, [and] people involved in forestry." *Id.* at 924 (statement of Sen. Domenici). The resulting exemption of normal farming activities from the permit requirement, Congress hoped, would "greatly simplify the administrative process and reduce the potential redtape burden." *Id.* at 897 (statement of Sen. Randolph).

As this case perfectly demonstrates, implementation of the normal farming exemption has not proceeded as Congress intended. The interpretation and administration of the Section 404 normal farming exemption by the Environmental Protection Agency and the U.S. Army Corps of Engineers in this case, acquiesced in by the Ninth Circuit, have not fulfilled Congress' aim of minimizing the interference of federal regulators in the routine decisions of farmers and ranchers.

This is not a case about a farmer or rancher indiscriminately discharging dredged or fill material into navigable waters. This is a case of a farmer attempting to plant a different crop on his farmland, a very normal farming activity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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